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IN THE

Supreme Court of the United States

October Term, 1964

No. [redacted] 217

PEPPERIDGE FARM, INCORPORATED,

Petitioner,

against

THE HONORABLE FREDERICK VAN PELT BRYAN, DISTRICT JUDGE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1964

No. 1244

PEPPERIDGE FARM, INCORPORATED,

Petitioner,

against

THE HONORABLE FREDERICK VAN PELT BRYAN,
DISTRICT JUDGE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This brief, in opposition to the petition, is respectfully submitted in behalf of the respondent, the Hon. Frederick Van Pelt Bryan, District Judge, and Arthur Nash, the plaintiff in the private anti-trust action against petitioner pending in the United States District Court for the Southern District of New York.

The Questions Raised by Petitioner Have no Bearing on the Granting or Denial of Certiorari

The four (4) "questions" presented by petitioner (pet. pp. 2, 3) are in no way related to the criteria applied by this court in exercising its discretion with reference to the extraordinary relief sought herein.

Even if the "facts" on which they are predicated were true (which they are not, as will be demonstrated below), these "questions" are mere reiterations of the conclusory

arguments presented by petitioner upon the original motion for transfer.

Petitioner fails to show that the rulings below have been on matters outside the jurisdiction of those courts, that the "questions" here presented relate to an extraordinary cause, or that the decision of the Court of Appeals for the Second Circuit, in denying petitioner a writ of mandamus, is in conflict with the decisions of another court of appeals on the same matter, or of this Honorable Court [Rev. Rules of the Supreme Court of the United States, Rule 19 (1) (b)].

The real "question" to be considered herein—and which must be answered in the negative—is:

> "Did the respondent, the Hon. Frederick Van Pelt Bryan, District Judge, so clearly and arbitrarily abuse his discretion in denying petitioner's motion to transfer, as to require the United States Court of Appeals for the Second Circuit to grant the drastic and extraordinary writ of mandamus sought by petitioner below?"

Statement of the Case

The facts petitioner selected as the basis for its four "questions" are so inadequate and distorted as to render this case unrecognizable. Many salient ones are omitted, others misstated, and, in the main, petitioner's assertions are unsupported by the record.

In order to spare the Court any detailed refutation, this brief will confine itself to the record facts, demonstrating that respondent properly exercised his conceded jurisdiction in denying transfer, on the accepted grounds of "convenience of parties and witnesses, in the interests of justice" [28 U. S. C. § 1404(a)], thus justifying denial of the writ of mandamus by the United States Court of Appeals for the Second Circuit.

Nature of Motion and Description of Moving and Answering Affidavits in District Court

Petitioner moved below, pursuant to 28 U. S. C. 1404(a), to transfer this action to the Southern District of Florida (A. 18),* submitting in support thereof the affidavit of E. Lee Schneider (A. 19-24), which merely claimed, in conclusory form, that New York was a stranger to this cause and that the State of Florida is the place where substantially all of the transactions took place and the majority of witnesses resided.

The moving affidavit failed to substantiate the foregoing, and other than a cursory description of the physical means by which plaintiff distributed petitioner's products, there was no attempt to support these assertions, or to describe the nature or materiality of the testimony of the specified Florida witnesses, relating to the basic issues in this anti-trust action, to wit: (a) *price fixing* (at every level of distribution throughout the United States from petitioner's bakeries to its multiple distributors (including plaintiff)—to the multiple's sub-distributors—to the retail stores—and finally, to the ultimate customers); (b) *restriction of outside products,* and (c) *wrongful termination of plaintiff's franchise.***

On the other hand, plaintiff's answering affidavit (A. 25-41) detailed the many transactions upon which this private anti-trust action is based, which took place at petitioner's home office in Norwalk, Connecticut, approximately 50 miles from the Southern District of New York Courthouse, relating to the creation and termination of his franchise, and the decisions, directives and methods whereby

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* This and similar references are to the appendix to the Petition for a Writ of Mandamus filed in the Court of Appeals.

** Plaintiff's affidavit below demonstrated that with the exception of petitioner's manager Grady and Plaintiff's former sub-distributors (all of whom are subject to petitioner's control), none of its proposed Florida witnesses had any knowledge concerning these three basic issues (A. 28-32).

petitioner pursued its unlawful policies of price fixing and other anti-trust violations throughout the United States, including the Southern District of New York.

Plaintiff showed that all records, including inter-office memoranda, price lists, price directives and the like, created and imposed by petitioner over the years in furtherance of its violations of the Anti-trust Laws, are also located in Norwalk, and that all of its top executives, who participated in this unlawful conspiracy, either live or work in the metropolitan New York area or in Pennsylvania (A. 26-28). The opposing affidavit also sets forth with particularity the nature and extent of the testimony of all of the many witnesses in the metropolitan area of New York City having a material bearing on the essential elements of this case (A. 32-35).

Plaintiff's answering affidavit (A. 35-38) also showed conclusively that his return to New York, after the wrongful termination of his Florida distributorship by petitioner, was not for the alleged purpose of forum shopping —but that he and his wife were lifetime residents of the Southern District of New York before going to Florida to establish his distributorship for petitioner, and that when it was wrongfully terminated, they naturally returned to the place of their birth, wherein their family family ties are located, and have now become permanent residents of this city.*

Petitioner's moving affidavit (A. 24) concludes with the mere statement that unless this case is transferred to Florida it would be difficult and expensive for defendant to obtain the appearance of necessary witnesses. Per contra, plaintiff's affidavit (A. 38-40) established that the trans-

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* In any event, it should be noted that venue in the Southern District of New York does not depend upon plaintiff's residence therein, since petitioner concededly does business in the State of New York and distributes its products in the said Southern District (A. 20). Thus, the venue privilege granted by 15 U.S.C. § 15 is applicable.

fer of this action to Florida would involve undue hardship and expense to him, which he could ill afford, depriving him of the benefit of the personal testimony of key witnesses to the basic issues of unlawful price fixing, restriction of outside lines and wrongful termination of the franchise.

Respondent's Decisions Below

After reviewing all of the facts and circumstances contained in the moving and answering affidavits upon the original argument and rehearing of petitioner's motion in the District Court, the respondent properly found, *inter alia*:

> "... *Considering all the circumstances defendant has not shown that the balance of convenience is so heavily weighted in its favor as to overcome plaintiff's choice of forum and to require transfer to the Southern District of Florida.*" [Emphasis supplied] (A. 53-54);

and

> "*The convenience of witnesses was duly considered on the original motion and as so considered supports the decision made. . . .*" [Emphasis supplied] (A. 56)

ARGUMENT

POINT I

Petitioner failed to show respondent's abuse of discretion warranting issuance of extraordinary Writ of Mandamus by Court of Appeals for the Second Circuit.

The facts at bar are strikingly similar to those in *Ford Motor Co.* v. *Ryan*, 2 Cir., 182 F. 2d 329; *certiorari denied*, 340 U. S. 851.

In *Ford*, plaintiffs and the major defendants were *not* residents of New York—and the jurisdiction of the South-

ern District Court of New York attached solely through the special venue statute of the Anti-trust Laws (15 U. S. C. A. 15) since the Ford Motor Co. did business in that district. Judge Ryan below (*Ferguson* v. *Ford*), 77 F. Supp.. 425 at 433) based his denial of transfer, in part, upon the fact that the movants failed to show that the balance of convenience of the parties and witnesses, and the interests of justice, warranted the removal to the Eastern District of Michigan.

In *Ford Motor Co.* v. *Ryan, supra,* the late Judge Frank of the United States Court of Appeals for the Second Circuit based his denial of the writ of mandamus upon the showing that there was no abuse of discretion on the part of Judge Ryan, because the movant had not met the test of convenience of witnesses and, therefore, had "not borne their burden of making out a 'strong' enough case for the transfer." He further observed that "At best the judge [below] must guess, and we should accept his guess *unless it is too wild"* [Emphasis supplied] (182 F. 2d 329 at 331, 2). Certainly, it cannot be said that respondent's determination herein was a "wild" one, in light of the clear-cut demonstration concerning the convenience of witnesses and parties in connection with the Southern District of New York.

Chief Judge Learned Hand, in his concurring opinion, held that in view of the venue privilege granted by 15 U. S. C. A. § 15, he was ". . . not persuaded that the balance of convenience [was] strong enough to declare 'clearly erroneous' the finding of the district judge that the defendants [had] not overcome the handicap of § 15." (182 F. 2d at 332).

Judge Swan, also concurring in *Ford* v. *Ryan,* predicated his denial of the writ of mandamus on the holding:

> "When Congress withholds interlocutory reviews, § 262 [of the judicial Code, now incorporated in 28

> U. S. C. A. § 1651(a)] can, of course, not be availed of to correct a mere error in the exercise of conceded judicial power." See also Ward Baking Co. v. Holtzoff, 2 Cir., 164 F. 2d 34, 36 (182 F. 2d at 332).

In any event, all three concurring opinions in *Ford* v. *Ryan, supra,* support the denial of the writ of mandamus at bar; and this Court's denial of certiorari in 340 U. S. 851, is precise authority for the denial of petitioner's instant application.

Petitioner's oblique reference (pet. p. 16) to this Court's decision in *Gulf Oil Corp.* v. *Gilbert,* 330 U. S. 501, 508, is inapropos. In *Gulf* the primary basis for granting the transfer, on the ground of forum non conveniens, was that it was a diversity case involving local state law, and not the Federal Anti-Trust Laws with a special venue statute as at bar. Thus, this Court specifically pointed out that:

> ". . . There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." (330 U. S. at 509)

The instant case is not like a personal injury action where the locale is of particular significance, or where all parties and witnesses, being local people, have their natural abode. We are dealing here with a large corporation having widespread interests throughout the country and its principal offices in the New York area, involving issues of nationwide importance. The foregoing distinction is specifically made by the Hon. Irving R. Kaufman in 10 F. R. D. 595 at page 606 wherein he distinguishes the criteria applied by this Court to diversity cases as in *Gulf, supra,* from those in anti-trust actions, stating:

> "*In contrast to this type of suit is the anti-trust suit. This type of controversy is generally not local*

in nature and transfers are usually prevented by the widespread public interest in the action and the multi-state location of witnesses and the parties' activities. [citing cases] (Underscoring supplied)

CONCLUSION

This petition should in all respects be denied.

Respectfully submitted,

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